

## Navigating FTC's Guidance on Social Media Marketing

### Multiplayer Marketing

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-By Alan Friel

With the rapid growth in social marketing, the Federal Trade Commission has become increasingly concerned about these new methods of reaching out to consumers. Specifically, it's wary about ways in which some brands and their agencies have abused these evolving media tools, betraying the trust of consumers and the social communities in which they interact.

These practices include paying Internet users to post disingenuous positive product reviews; "astroturfing," where advertisers pretend to be unaffiliated consumers and post misleading or false information; and creating Flogs, fake blogs that purport to be objective, but are really designed to covertly promote a product.

As a result, effective Dec. 1, the FTC will have new guidance in place for advertisers who make use of social media.

The FTC expects companies to make reasonable efforts to educate the celebrities, bloggers, employees and others promoting their brand at their behest regarding disclosing their connection to the advertiser and not making false or misleading statements or claims. The guidance specifically singles out celebrity spokespeople, requiring them to disclose financial connections to brands when promoting them other than in ads and commercials, such as on talk shows or via social media, and making them personally liable for false claims made about a product.

Even if a celebrity is contractually obligated to make scripted comments, they're still personally liable if they know or should know the claims are untrue. The FTC has also put an end to the use of testimonials indicating atypical results that include the disclaimer "Results not typical." Now, the typical expected results must be explained. Companies must also monitor these activities and take corrective action when the rules are not followed. The FTC says it's taking these matters seriously, noting it has prosecutorial discretion and will likely target the more egregious cases and repeat offenders.

There will likely be some practical hurdles for advertisers as they work to comply with the new FTC direction. Advertisers may not be able to control every comment posted to third-party sites, but the FTC may still hold them liable for misleading claims, particularly if they did not exercise best efforts to prevent them. And, while the FTC states that "the advertiser should take steps to ensure that these disclosures are being provided," it does not give guidance as to what it expects to see in the form of disclosures or monitoring and corrective action.

Disclosure becomes more difficult in a chat room or on Twitter, where there is a limitation on the amount of content that can be posted. An evolving disclosure method in such instances is to add the text "Sponsored Post", "#paid", or "#Ad." A new service at <http://cmp.ly/> provides free mini-URL links to detailed disclosures and upsells monitoring services. Whether these notices and monitoring efforts will meet the FTC's requirements is yet to be determined.

Whatever the practical considerations affecting compliance, the FTC is placing the risk of viral and social marketing's lack of control on brands and their agencies, and telling them they must institute sound policies and practices to make reasonable efforts to prevent activities that may result in consumer confusion. Accordingly, every company, and all PR, marketing and advertising agencies that utilize social media for promotional activities, should have and enforce policies and practices for the use of social and other evolving media, as well as use by its employees, spokespersons, vendors and agents. This includes policies regarding how consumers are engaged, educated, monitored and handled.

Best practices reflective of the FTC's guidance are already emerging. In May 2009, in anticipation of the New Guides, IZEA, a blog-network-advertising firm that pairs advertisers' products with relevant bloggers, began providing its clients with reports tracking whether its bloggers were disclosing compensation arrangements. Companies can also look to industry best practices to guide them in developing their own policies. The **Word of Mouth Marketing Association Ethics Code of Conduct**, was specifically pointed to by the FTC as an "important step" to ensuring "transparency for marketers who engage in new forms of marketing." WOMMA requires disclosure, veracity and transparency, and prohibits cash payments to consumers for their support.

The Interactive Advertising Bureau published its **Social Media Advertising Best Practices** in May 2009. Reportedly, the Children's Advertising Review Unit (CARU), another self-regulatory body, is currently examining use of social media for selling to children as part of soon-to-be announced guidelines on blurring, which are expected to counsel for a more conservative approach regarding children.

These various industry best practices are a good place for a company to start when developing policies and practices under the guidance of experienced legal counsel. Such policies and practices, along with ongoing training and compliance review, can help companies navigate the complexity of this developing field and reduce potential liability and negative consumer backlash.

*Alan L. Friel is a partner and advertising lawyer at Wildman, Harrold, Allen & Dixon. He can be reached at [friel@wildman.com](mailto:friel@wildman.com).*